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No. 01-144

Supreme Court, U.S.
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In The

Supreme Court of the United States

FULTON COUNTY, GEORGIA, *et al.*,

Petitioners,

v.

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT CEEDA ENTERPRISES, INC. d/b/a RILEY'S RESTAURANT AND LOUNGE'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Before enacting an ordinance that seeks to address negative secondary effects associated with adult entertainment establishments, must a local government await actual development of such negative secondary effects within its jurisdiction, or may the local government legislate in a preventive fashion based upon evidence of such negative secondary effects from other local government jurisdictions?

II. Where a local government relies upon judicially approved studies from other jurisdictions indicating that negative secondary effects are associated with adult entertainment establishments, does a resulting local government ordinance that prohibits the service or consumption of alcohol at adult entertainment establishments violate the First Amendment because studies specific to that local government's jurisdiction did not indicate negative secondary effects associated with such establishments?

LIST OF INTERESTED PARTIES

Pursuant to Rule 14.1(b), the following list indicates all of the parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed:

Fulton County, Georgia,
Appellee Below,
The Board of Commissioners of Fulton County, Georgia,
Appellee Below,
Mitch Skandalakis,
Appellee Below,
Nancy Boxill,
Appellee Below,
Gordon Joyner,
Appellee Below,
Robert Fulton,
Appellee Below,
Tom Lowe,
Appellee Below,
Emma Darnell,
Appellee Below,
Michael Hightower,
Appellee Below,
Flanigan's Enterprises, Inc. of Georgia,
Appellant Below,
6420 Roswell Road, Inc.,
Appellant Below,
Harry J. Freese,
Appellant Below,
Fannies, Inc.,
Appellant Below,
William H. Parks, Jr.,
Appellant Below,
CEEDA Enterprises, Inc.,
Appellant Below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent CEEDA Enterprises, Inc. d/b/a Riley's Restaurant and Lounge states that it is a privately owned company, has no parent company, and no publicly held company owns 10% or more of its stock.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CEEDA Enterprises, Inc. d/b/a Riley's Restaurant & Lounge ("CEEDA") respectfully submits that the decision below correctly analyzed the facts and applied the governing law, and that the Petition for Writ of Certiorari, presenting no valid grounds for review, should be denied.

OBJECTION TO QUESTIONS PRESENTED

CEEDA objects to the Petitioners' first question presented. At no time was this ever a question below. The local government is given broad latitude in making legislative decisions regarding conditions the municipality deems that its citizens may be exposed to that may have an adverse impact on the community as a whole. The only question presented is whether the governing body applied the correct standards in passing such legislation complained of below. This Court and other courts have held that any time a governing body, whether local, state, or federal, desires to set forth legislation that may have an impact on one's First Amendment rights, the burden of proof shifts to the governing body to make certain that such legislation is content-neutral and not content-based.

ARGUMENT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS' DECISION DOES NOT CREATE A CONFLICT AMONG FEDERAL CIRCUIT COURTS OF APPEALS

The Petitioners are somewhat misguided by their belief that the Eleventh Circuit Court of Appeals' decision creates a conflict among the various circuits.

All of the Circuits agree that the governing body when passing legislation involving First Amendment matters has the burden of proving that the ordinance is content-neutral and supports some compelling governmental interest of the body passing the ordinance.

I fail to see how Fulton County can say that any local government needs to wait until the secondary adverse effects complained of have descended upon them before passing an ordinance to combat the same.

The Appeals Court simply stated that if the local government conducts a study and that study reveals no secondary effects in the local area, then the studies from other jurisdictions cannot be used in furtherance of the proposed ordinance. In other words, one does not get a choice. If you make the study, then you must abide by the results thereof. The Court of Appeals simply said that Fulton County had not met the second prong of *O'Brien*. See *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679.

Further, all Circuits agree with the standard set out in *Renton* that "[T]he First Amendment does not require a city before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence

the city relies upon is reasonably believed to be relevant to the problem that the city addresses." See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

II. THE ELEVENTH CIRCUIT DECISION DOES NOT CONFLICT WITH THE SUPREME COURT OF THE UNITED STATES AND EARLIER DECISIONS OF THE ELEVENTH CIRCUIT COURT OF APPEALS.

The Eleventh Circuit Court of Appeals' decision in the matter before the Court correctly states the law as applied in *O'Brien*, supra.

Fulton County clearly did not meet its burden as required by all Circuits and the U.S. Supreme Court. It failed to prove, through its own study, that any adverse secondary effects existed in the county – the evidence did not support its proffered justification for amending Section 18-76 of its Ordinances. It had no governmental interest to protect.

Both Fulton County and the four clubs, consolidated for trial purposes, commissioned studies as to the adverse secondary effects these adult entertainment clubs might have on the communities surrounding them. Both studies reached the same conclusion – there were no adverse secondary effects connected with the clubs in question. A fifth club participated in the studies but brought a separate action in state court.

The Georgia Supreme Court has stated that in order for local governing bodies to pass ordinances prohibiting the mix of live nude entertainment and the consumption and sale of alcoholic beverages on the same premises at

the same time, the body must rely on its own studies or studies made in other communities that have the same situation. The Court went on to state that if the local government chose to make its own studies then it should be prepared to suffer the results of such study. See *Chambers v. Peach County*, 266 Ga. 318, 467 S.E. 2d 519 (1996).

Peach County lost the first round in the battle but came back a second time after being told by the Georgia Supreme Court how to do it the right way. It chose to rely on studies from other jurisdictions.

Fulton County did just the opposite. The Fulton County Board of Commissioners authorized a Study Group Committee to find out if any of the adverse secondary effects existed in the county in regard to the clubs offering alcoholic beverages and live nude entertainment. The Committee was comprised of various staff people from the Planning, Legal, and Police Departments of Fulton County, citizens of the community, and the club owners.

In the end, the Committee determined that no adverse secondary effects existed in Fulton County in relation to these adult entertainment clubs. The adverse secondary effects referred to are: 1) diminution of property values, 2) increase in crime around the clubs, and 3) urban blight around the clubs affected.

Fulton County simply chose not to follow its own study that showed no adverse secondary effects, but chose to rely upon studies from other jurisdictions as its evidence in passing the amendment to Section 18-76 of its

Ordinances. Accordingly, it did not meet its burden with regard to the second prong of *O'Brien*, supra.

CONCLUSION

The Eleventh Circuit correctly applied the law as set out in *O'Brien*; accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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